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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PAUL DWIGHT BAKER, Defendant and Appellant.	2d Crim. No. B205902 (Super. Ct. No. 1210371) (Santa Barbara County)

Paul Dwight Baker was sentenced to five years eight months state prison pursuant to a written plea agreement in which he pled no contest to "wet" reckless driving (Veh. Code, §§ 23103/23103.5), receiving stolen property (Pen. Code, § 496, subd. (a)), driving when his license was suspended for a prior DUI (Veh. Code, § 14601.2, subd. (a)), and failure to appear while on bail with an out-on-bail enhancement (Pen. Code, §§ 1320.5; 12022.1, subd. (b).)[1] He appeals, claiming that he was denied the right to bring a motion to withdraw his plea and that the trial court should have appointed a new attorney to argue the motion. (§ 1018.) We affirm. A defendant is not entitled to "substitute counsel on demand" after the trial court conducts a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) and finds that defendant received effective assistance of counsel in negotiating the plea. (*People v. Smith* (1993) 6 Cal.4th 684, 694-696.)

[1] All statutory references are to the Penal Code unless otherwise stated.

Procedural History

Appellant and his court-appointed public defender, Santa Barbara County Deputy Public Defender J. Jeff Chambliss, negotiated a change of plea in which appellant admitted possessing a stolen license plate, "wet" reckless driving, driving a motor home with a suspended driver's license, and failing to appear after appellant was released on bail or on his own recognizance. Appellant also admitted three prior DUI convictions and admitted suffering four prior prison terms within the meaning of section 667.5 subdivision (b). The written plea agreement stated that the maximum sentence was nine years eight months, that the prior prison term enhancements would be dismissed, and that appellant may request that "Count 2 [for receiving stolen property] be reduced to misd[emeanor] at sentencing."

At the sentencing hearing, Chambliss stated that appellant was "adamant about wanting to withdraw his plea to Count 2. He did not do that offense he says, and that's the receiving stolen property offense." Chambliss declared a conflict of interest because he negotiated the plea and asked the trial court to appoint a second attorney to advise appellant on a possible motion to withdraw the plea.

The trial court appointed counsel on the limited issue of whether appellant should be able to withdraw his plea. A second attorney met with appellant, determined there was no good cause to bring a motion to withdraw the plea, and was excused. Appellant submitted a *Marsden* motion to remove Chambliss as his attorney.

At the *Marsden* hearing, appellant complained that the prosecution had offered probation and drug treatment with a ten year suspended sentence. Chambliss told him that the prosecution could not prove a felony DUI count and recommended that they try to negotiate a better deal.

Chambliss stated: "it's true, I said don't take that deal because you're pleading to something you didn't do, or at least you're pleading to something that they can't prove." Chambliss negotiated a plea in which the felony DUI was reduced "to a wet reckless" and reserved the right to argue for probation.

The trial court found that appellant received "proper advice. Mr. Chambliss was simply doing his job, and if he advised you that it wouldn't be wise to plead to a charge that the D.A. can't prove, that's proper advice." Appellant was "informed of exactly what the terms of the plea were, and that's how it played out. [The prosecution] arguing for prison and your attorney . . . arguing for probation and treatment. So you weren't misinformed."

The trial court denied the *Marsden* motion, heard sentencing arguments, and sentenced appellant to five years eight months state prison.[2]

Motion to Withdraw Plea

Appellant argues that a presentence motion to withdraw a plea is a fundamental right and that defense counsel must, at all times, carry out defendant's request to make such a motion. (See *People v. Osorio* (1987) 194 Cal.App.3d 183, 188-189; *People v. Brown* (1986) (179 Cal.App.3d 207, 215.) He claims the trial court erred in appointing advisory counsel and deferring to counsel's decision not to bring a motion to withdraw the plea.

Appellant's reliance on *People v. Eastman* (2007) 146 Cal.App.4th 688 (*Eastman*) is misplaced. There, defendant pled no contest to two counts of child molestation in exchange for a 10 year prison sentence. At the sentencing hearing, defendant stated that he wanted to withdraw his plea. (*Id*., at p. 691.) Defendant accused the prosecutor and his court appointed attorney of misconduct and, in a letter, stated that counsel falsely told him that his mother had agreed to testify against him. (*Id*., at pp. 691-692.) The trial court denied the motion to withdraw the plea and sentenced defendant to the stipulated 10 years. (*Id*., at p. 695.)

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[2] The trial court imposed a three year upper term on count 5 for failure to appear (§ 1320.5) plus two years on the out-on-bail enhancement (§ 12022.1, subd. (b)), and an eight month consecutive sentence (one-third the midterm) on count 2 for receiving stolen property (§ 496, subd. (a)). Appellant received concurrent jail sentences on the misdemeanor counts for reckless driving (Veh. Code, §§ 23103/23103.5) and driving with a suspended license (Veh. Code, § 14601.2, subd. (a)).

The Court of Appeal conditionally reversed because the trial court failed to conduct a *Marsden* hearing. "The letter on its face stated at least one specific factual complaint about Eastman's appointed attorney: that he was acting in cahoots with the district attorney when they persuaded him to accept the plea bargain by falsely telling him his mother was going to testify against him. Although Eastman did not expressly ask to have his attorney replaced, the letter did request that Eastman receive an 'adequate defense' and his complaints set forth an arguable case that a fundamental breakdown had occurred in the attorney-client relationship that required placement of counsel." (*Eastman, supra,* 146 Cal.App.4th at pp. 695-696.) The *Eastman* court remanded with directions to conduct a *Marsden* hearing and to appoint new counsel if defendant made a prima facie showing of ineffective assistance of counsel. The trial court was ordered to reinstate the judgment if the *Marsden* motion was denied or, in the event the *Marsden* motion was granted, reinstate the judgment if newly appointed counsel did not make a motion to withdraw the plea. (*Id*., at p. 699.)

Marsden Hearing

Here the trial court conducted a *Marsden* hearing and determined that appellant received competent representation. There was no breakdown in the attorney-client relationship requiring the appointment of new counsel to replace Chambliss. Although appellant complains that the trial court did not rule on his motion to withdraw the plea, appellant discussed the motion at the *Marsden* hearing and was concerned that he might not receive probation. The trial court impliedly found that the plea could not be withdrawn simply because appellant had changed his mind. (See e.g., *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Substitute Counsel

Appellant claims that a trial court must appoint substitute counsel to argue a motion to withdraw a plea if the defendant so requests. We reject the argument because a defendant may not force the substitution of counsel by manufacturing a conflict, i.e., by filing a groundless motion to withdraw a plea based on ineffective assistance of counsel. (*People v. Smith* (1993) 6 Cal.4th at 684, 696.) *Eastman* is a "*Marsden* case" and holds

that "when a defendant complains about the adequacy of appointed counsel," the trial court has the duty to "permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering ineffective assistance. [Citations.]" (*Id*., at p. 695.) If the trial court grants the *Marsden* motion, it is up to "newly appointed counsel" to make a motion to withdraw the plea and if counsel decides not to do so, any motions by defendant "are denied." (*Id*., at p. 699.)

Here the trial court, in an abundance of caution, appointed a second attorney to advise appellant on whether a motion to withdraw the plea should be made. There was no prejudice to appellant. Although the Supreme Court in *Smith* disapproved of the use of advisory counsel, it stated that the decision to bring a motion to withdraw a plea "will, of course, be determined by the new attorney" if the *Marsden* motion is granted. (*Id*., *People v. Smith, supra,* 6 Cal.4th at p.696; see also *People v. Brown, supra,* 179 Cal.App.3d at p. 216 [counsel not required "to make a motion which in counsel's good faith opinion is frivolous"].) The *Smith* court stressed that "new counsel should not be appointed without a proper showing. A series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one. The [trial] court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. This lies within the exercise of the trial court's discretion, which will not be overturned on appeal absent a clear abuse of that discretion." (*People v. Smith*, *supra,* 6 Cal.4th at p. 696.)

Appellant's statement that he wanted to withdraw his plea to one or more counts did not require the appointment of new counsel. Assuming, arguendo, that the trial court erred in not ruling on appellant's pro per motion, the error was harmless. Once entered, a plea may not be withdrawn or set aside absent clear and convincing evidence that the ends of justice would be subserved by permitting a change of plea to not guilty. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) "Guilty pleas resulting from a

bargain should not be set aside lightly and finality of proceedings should be encouraged. [Citations.]" (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

The record shows that appellant received effective assistance of counsel who obtained a favorable negotiated disposition. Appellant told Chambliss that he wanted to proceed with the deal and knowingly, intelligently, and voluntarily waived his rights. Unlike the *Eastman* case, there are no grounds to conditionally reverse and remand for a *Marsden* hearing. (See *Eastman, supra,* 146 Cal.App.4th at p. 697: *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1086-1088 [defendant's motion for new trial based on incompetence of counsel requires *Marsden* hearing]; *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1368-1369 [same].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frank J. Ochoa, Jr. , Judge

Superior Court County of Santa Barbara

California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner, Executive Director, Richard B. Lennon and Suzan E. Hier, Staff Attorneys, for Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, John R. Gorey and David F. Glassman, Deputy Attorneya General, for Plaintiff and Respondent.